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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 392

H. K. PORTER COMPANY, INC.
DISSTON DIVISION - DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, H. K. Porter Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on May 19, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially reported,* is reproduced in the appendix to this petition (A 24).** The opinion of the Trial Ex-

*It is reported unofficially at 53 CCH Labor Cases, para. 11,238.

**The abbreviation "A" refers to the appendix to this petition.

aminer is set forth in the Joint Appendix in the Court of Appeals (JA 45-54).* The National Labor Relations Board did not file a separate opinion of its own on the merits but adopted the Trial Examiner's findings, conclusions and recommendations (JA 58-59).**

JURISDICTION

Jurisdiction for this Court to review by writ of certiorari the judgment of said Court of Appeals entered May 19, 1966 is conferred by the provisions of 62 Stat. 928 (1948), 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can the National Labor Relations Board or a Court of Appeals evaluate the union's reasons for insisting on a substantive provision and the employer's reasons for refusing to agree to such provision as the basis for determining that the employer bargained in bad faith in not agreeing to the union's demand for such provision?

2. Can a Court of Appeals indirectly compel an employer to agree to a substantive provision by the wording of its opinion notwithstanding the express prohibition in Section 8(d) of the National Labor Relations Act?

3. Where one party states and consistently maintains the position that it will never sign a contract without a certain substantive provision, does the other party have a duty to bargain with regard to that provision?

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*The abbreviation "JA" refers to the Joint Appendix in the Court of Appeals.

**153 N.L.R.B. No. 119 (1965).

STATUTES INVOLVED

The following portions of the National Labor Relations Act are involved in this case:

Section 8(a)

"It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * *

"(5) to refuse to bargain collectively with the representatives of his employees . . . ." 61 Stat. 140, 141 (1947), 29 U.S.C. §§ 158(a)(1), 158(a)(5).

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 61 Stat. 142 (1947), 29 U.S.C. § 158(d).

STATEMENT OF THE CASE

This case was before the Court of Appeals on a petition filed by H. K. Porter Company, Inc. (petitioner),* pursuant to Section 10(f) of the National Labor Relations Act, to review a final order of the National Labor Relations Board (respondent)* which held that the Company had bargained in bad faith with United Steelworkers of America, AFL-CIO* at the Company's Danville, Virginia plant in violation of Sections 8(a) (5) and (1) of the National Labor Relations Act (hereinafter sometimes called the "Act"). The Board also filed a cross application with the Court of Appeals, pursuant to Section 10(e) of the Act, for enforcement of its order.**

The negotiations at issue in this case and in which the Company was found to have bargained in bad faith took place in the period from October 23, 1963 to September 10, 1964 (JA 50-51). During that period the parties held twenty-one bargaining sessions in which they reduced the unresolved issues from fourteen to three (JA 47). During the bargaining sessions, the Union demanded that the collective bargaining agreement include a dues check-off or other dues collection provision but the Company's negotiator, plant manager Jones, refused to agree to such provision (JA 47). Mr. Jones' reason for such refusal, as he stated during bar-

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*These parties are referred to in this petition, respectively, as the "Company", the "Board", and the "Union".

**The Union also filed a petition to review the same order of the Board on the grounds that the Board erred in not considering whether the Company bargained in bad faith on a ground *additional* to that found by the Board and in not ordering the Company to agree to the Union's demand for a dues collection provision.

gaining, was that the collection of dues is the Union's business and not the Company's (JA 16, 28-30). His refusal was not because of any inconvenience to the Company in checking off union dues (JA 28, 48). The Union representatives stated to Mr. Jones that the Union would not sign a contract without a dues collection provision (JA 30-31, 33). The labor contracts at some of the Company's other plants contain a dues check-off provision (JA 48) and the Union has signed contracts without a dues check-off provision (JA 20). Though the Company makes payroll deductions for United States Savings Bonds, United Fund, and dependents' coverage under the employees insurance plan maintained by the Company (JA 9-10, 25, 48), it has refused in the past to make other payroll deductions (JA 28-29). The Union has over 300 members at the Company's Danville plant (JA 17) and has monthly dues of five dollars per member (JA 19). According to the testimony of a Union witness, it would be possible for the Union to collect dues at the monthly meetings of the Local or by mail (JA 18). The closest existing Union office to Danville is in Roanoke, a distance of about 85 miles, although an elected officer of the Union's Local maintains the records and files of the Local in Danville (JA 19, 46).

After the filing of a charge by the Union, the General Counsel of the Board issued a complaint which charged that the Company had bargained with the Union in bad faith since October 21, 1963 "by, *inter alia*, adamantly rejecting the Union's proposal for a provision for the deduction of union dues" (JA 39-40). After hearing, the Trial Examiner issued a decision in which he held that the Company had refused the Union's proposal for a dues check-off provision for the purpose of frustrating an agreement with the Union and thus had

engaged in bad faith bargaining in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act. The Trial Examiner set forth the following "factors" (and no others) as the basis for his conclusion that the Company's position with respect to a dues check-off provision was taken for the purpose of frustrating an agreement with the Union (JA 49-51):

> 1. Jones, the Company's negotiator, had an antiunion animus.
>
> 2. Jones had a desire not to give "aid and comfort" to the Union by assisting it in collecting dues and this evidences an attitude inconsistent with the obligation imposed upon an employer by the National Labor Relations Act.
>
> 3. The Company had a position during bargaining of reliance upon the economic strength of the parties and this runs counter to the objectives of the Act.

The Trial Examiner's recommended order was that the Company cease and desist from refusing to bargain collectively with the Union and, affirmatively, that the Company bargain collectively with the Union. The Examiner recognized in his decision (footnote 9) that under the National Labor Relations Act the Company could not be required to agree to a dues check-off provision as demanded by the Union. He stated in this regard:

> "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agree-

ment or an impasse, the requirements of the Act will have been fulfilled." (JA 51).

On July 9, 1965, the Board, without a separate opinion of its own on the merits, issued a decision and order adopting the Trial Examiner's findings, conclusions and recommended order.

The Court of Appeals on May 19, 1966, by a 2 to 1 decision, affirmed and enforced the Board's decision and order. The majority of the Court, in an opinion by Circuit Judge Wright, concluded that ". . . it is clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off . . ." (A 32). The majority appears to have based this conclusion on the following grounds:

1. In a prior proceeding involving the Danville plant, the Company was held to have bargained in bad faith* (A 26).

2. When bargaining resumed after the Board's order in the prior proceeding, this being the commencement of the period of bargaining involved in the present case, "some 14 items were open and unresolved. At the time of the final meeting on September 10, 1964, only three items remained unresolved, the union having given in on all of the others"** (A 27).

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*The majority had stated previously in their opinion that this prior proceeding was not involved in the present case (A 25).

**As noted by Senior Circuit Judge Miller in his dissenting opinion, the latter portion of this statement by the majority is "erroneous" (A. 42). The Trial Examiner found that during the period of bargaining involved in this case, "each of the parties withdrew certain of its bargaining proposals" (JA 47).

3. Because of the distance of the Danville plant from the Union's existing office in Roanoke, "without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation" (A 28).

4. "The check-off is included in 92 per cent of all contracts in manufacturing industries" (A 28).

5. The Company "had no general policy against a dues check-off" and "in some of its divisions the bargaining agreements so provide" for check-off (A 28).

6. The Company's refusal to grant check-off "was not based on inconvenience"; and there were deductions from wages at the Danville plant for other purposes such as United States Savings Bonds and United Fund. (A 29).

7. The Company's position "was simply that 'our purpose in denying check-off was that we were not going to aid and comfort the union'" (A 30).

The Court of Appeals, while formally affirming the Board and rejecting the Union's contention that the Board should have included in its order a provision requiring the Company to agree to a dues collection provision, has achieved the same effect by stating in the majority opinion (i) that it would be a "mockery" for the Company in future bargaining to refuse a check-off provision, (ii) that the portion of the Trial Examiner's footnote 9 which stated that the Company need not agree to a dues check-off "should be disregarded", and (iii) that any further refusal by the Company to agree to a dues collection provision will be subject to review "in any contempt proceeding" before "this court" (A 33).

Senior Circuit Judge Miller filed a very strong dissenting opinion in which he stated:

> "The fact that the examiner's three 'factors' fall so far short of supporting his conclusion of bad-faith bargaining on the part of the Company, and the further fact that *the record considered as a whole is devoid of support for his conclusion,* lead me to think the examiner was actuated by antimanagement animus. The three-member panel of the Board which rubber-stamped the examiner's decision either did so without examining the record or, I suggest, shared his antimanagement animus." [emphasis added] (A 42).

Judge Miller concluded his opinion by stating that he has "seldom seen a record so barren of support for the decision of the examiner and the Board. . . ." (A 44).

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Has Decided Important Questions of Federal Law in a Way in Conflict With Applicable Decisions of This Court, in That:

A. The Court of Appeals Sat in Judgment Upon the Substantive Terms of the Collective Bargaining Agreement.

There is only one way in which the Trial Examiner and the Court of Appeals reached the decision in this case that the Company bargained in bad faith over a dues check-off provision, and that is that they weighed the Union's reasons for wanting a check-off provision against the Company's reasons for not agreeing to it. The fact that the Examiner did this is correctly noted by Judge Miller in his dissenting opinion in the Court of Appeals where he stated:

> "The examiner's decision, adopted by the Board, dwelt on the union's need for a checkoff which could be granted by the Company without inconvenience to itself." (A 35).

The majority opinion in the Court of Appeals clearly shows that the majority of the Court also sat in judgment upon the bargaining positions of the parties with regard to a check-off provision. As set forth in the Statement of the Case, *supra*, p. 7, the majority appear to have asserted seven grounds upon which they affirmed the Board's finding of bad faith bargaining on the part of the Company with regard to a check-off provision. Five of these specifically deal with why the Union should have check-off and why the Company should not refuse to grant it.* Thus, the majority reasoned:

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*The other two reasons would not alone serve as a valid legal basis for finding bad faith bargaining. As to the first, "the adjudication of bad faith on an earlier occasion is [not] alone substantial evidence of present bad faith to support the Board's finding." *NLRB v. Southern Transport, Inc.*, 355 F.2d 978, 982 (8th Cir. 1966). As to the second, the majority apparently believes that it is evidence of bad faith for eleven issues to be resolved by the Union withdrawing its demands on the eleven issues. Actually, the majority's statement is erroneous. As pointed out by Judge Miller in his dissenting opinion, the Examiner found that the unresolved issues were reduced from fourteen to three because "each of the parties withdrew certain of its bargaining proposals" (A 42; JA 47). But even beyond the accuracy of the majority's statement, it is not evidence of an employer's bad faith if issues are resolved solely by the union withdrawing its bargaining demands. *NLRB v. United Clay Mines Corp.*, 219 F.2d 120, 126 (6th Cir. 1955).

1. That without check-off "the collection of dues would have presented the union with a substantial problem of communication and transportation" (A 28);

2. "The check-off is included in 92 per cent of all contracts in manufacturing industries" (A 28);

3. The Company "had no general policy against a dues check-off" and "in some of its divisions the bargaining agreements so provide" for check-off (A 28);

4. The Company's refusal to grant check-off "was not based on inconvenience" and there were wage deductions at the Danville plant for other purposes such as United States Savings Bonds and United Fund (A 29);

5. The Company's position "was simply that 'our purpose in denying check-off was that we were not going to aid and comfort the union'" (A 30).

The majority of the Court concluded that ". . . it is clear from the record that the Company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off. . . ." (A 32).*

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*Neither the Examiner nor the Court cited any affirmative evidence that the Company's reason for refusing check-off was to frustrate the bargaining. They both reached this conclusion merely by deciding that the Company had no valid reason, in their opinion, for not granting check-off. The true fact is that any frustration of bargaining that occurred was the result of the Union's adamant position that it would never sign an agreement without a dues collection provision. See *infra*, p. 19.

There can be no doubt that the Court of Appeals, as well as the Examiner, sat in judgment on the substantive terms of the contract by evaluating the proprieties of the Company's reasons for refusing check-off and the Union's reasons for demanding it.

This Court expressly held in *NLRB v. American National Ins. Co.*, 343 U. S. 395 (1952) that the Board does not have the statutory authority to pass upon the desirability of substantive provisions in collective bargaining agreements. In that case, former Chief Justice Vinson stated:

> "And it is equally clear that the Board may not, *either directly or indirectly,* compel concessions or otherwise *sit in judgment upon the substantive terms of collective bargaining agreements.*"
>
> * * *
>
> "Congress provided expressly that the Board *should not pass upon the desirability of the substantive terms of labor agreements.* Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board." [emphasis added] 343 U. S. at 404, 408-09.

Thus, the Trial Examiner and the Court of Appeals, by evaluating the Company's reasons for refusing check-off and the Union's reasons for demanding it, have totally disregarded this Court's clear pronouncement of the law as set forth in the foregoing case.

B. The Court of Appeals Has Indirectly Ordered the Company to Agree to a Dues Collection Provision in the Collective Bargaining Agreement.

The majority of the Court of Appeals have made it quite clear that the Company is now required to agree to the Union's demand for a dues collection provision. As noted in the Statement of the Case, *supra,* p. 8, this result is achieved through the wording of the majority opinion in the following specific manner:

1. It is stated in the majority opinion:

"To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A 33).

2. The Trial Examiner had said in footnote 9 of his decision:

"This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check-off. . . . If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled." (JA 51).

After setting forth verbatim this portion of the Trial Examiner's footnote 9, the majority of the Court of Appeals stated:

"This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off was 'for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining.' . . . Since the text of the trial examiner's decision controls, ***Footnote 9 should be disregarded.***" [emphasis added] (A 32-33).

3. The majority of the Court of Appeals stated that "while it is clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off, it is not necessary to include a specific reference to the check-off in the Board's order."

As the reason for this statement, the majority said:

"In any *contempt proceeding,* the record made before the Board in both Section 10(b) proceedings will be available to *this court.*" [emphasis added] (A 33).

The only inference to be gained from all of this is that the Company is being told to agree to the Union's demand for a dues collection provision or it will be dealt with by the Court of Appeals for the District of Columbia Circuit through a contempt proceeding. This inference is not reached by counsel for the Company alone. Judge Miller in his dissenting opinion in the Court of Appeals stated:

"Thus, in holding the examiner's footnote 9 should be disregarded, the majority hold in effect that Section 8(d) of the Act should be disregarded, and that *the Company should be held in contempt if, on remand, it does not agree to a contractual provision for some sort of Company aid in the collection of union dues.*" [*emphasis added*] (A 44).

The editorial writers have picked up the same inference. In CCH *Labor Law Reports,* No. 18, May 26, 1966, it is stated with regard to the decision by the Court of Appeals in this case:

"Although the Board's remedial order doesn't require that the employer agree to a checkoff, his continued refusal to do so may warrant the Board's moving for a contempt citation, the court advises."

In *NAM Reports*, Vol. 11, No. 23, June 6, 1966, it is stated with regard to this case:

> ". . . The Court of Appeals for the District of Columbia has issued a novel decision virtually directing an employer to agree to a union's demand for a check-off clause and warning him that he will be held in contempt if he does not."

What the majority of the Court of Appeals have done in this case is in direct violation of Section 8(d) of the National Labor Relations Act which provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."

This Court has consistently held that under the National Labor Relations Act the Board does not have the power to compel, either directly or indirectly, a party to agree to a substantive provision in a collective bargaining agreement. This principle was first stated by this Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937):

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever."

In *NLRB v. American National Ins. Co.*, 343 U. S. 395, 404 (1952), former Chief Justice Vinson said on behalf of this Court:

> "And it is equally clear that the Board may not, *either directly or indirectly, compel concessions* or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." [emphasis added].

In *NLRB v. Insurance Agents' International Union*, 361 U. S. 477, 486-87 (1960), this Court speaking through Mr. Justice Brennan, said:

"Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the 'good-faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 19. Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into § 8 (d) of the Act. . . .

"The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. . . . But it remains clear that § 8 (d) was an attempt by Congress *to prevent the Board from controlling the settling of the terms of collective bargaining agreements.*" [emphasis added].

In spite of the fact that the Court of Appeals did not *directly* order the Company to agree to a dues check-off provision, there can be no doubt that the opinion

rendered by the majority serves *indirectly* to compel the Company to agree. As stated by this Court in *American National Ins. Co., indirectly* compelling a party to agree to a substantive provision is just as prohibited under Section 8(d) of the Act as *directly* compelling the party to agree.

C. The Court of Appeals Has Acted to Equalize the Disparities of the Bargaining Power Between the Parties by Precluding the Company From Relying Upon Its Relative Economic Strength During Bargaining.

It is obvious that the Union does not have sufficient bargaining power at the Danville plant to compel the Company to agree to a dues check-off provision. The Court of Appeals, by evaluating the bargaining positions of the parties on this substantive provision and by indirectly compelling the Company to agree to the provision, has acted to equalize the disparities of the bargaining power which exist between the Company and the Union at the Danville plant.*

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*Another effect of these actions by the Court is that the Company is being compelled to give affirmative aid to the Union. In fact, the Trial Examiner expressly stated that the Company's desire not to give aid to the Union by assisting it in collecting dues "evidences an attitude inconsistent with the obligations imposed upon an employer by the Act" (JA 49). This is a clear error of law which the Court neglected to correct. As Mr. Justice Rutledge said in his separate opinion in *May Stores Co. v. NLRB,* 326 U.S. 376, 398 (1945), "Nothing in the Act requires an employer to maintain a union's prestige . . . ." Judge Miller in his dissenting opinion in the present case stated, with regard to the Examiner's error of law, that the Act "is for the benefit of employees and not unions" and that the Trial Examiner "confused the union with its members" (A. 41).

The Trial Examiner was even more direct in considering the bargaining power of the parties. As set forth in the Statement of the Case, *supra*, p. 6, among the factors given by the Examiner as the basis for his conclusion that the Company had bargained in bad faith with regard to a dues check-off provision was that the Company had relied upon the economic strength of the parties in refusing to accede to the Union's demand for a dues check-off provision and that "such a position by an employer run[s] coumter to the objectives of the Act" (JA 50). The Court of Appeals in affirming the Board and the Trial Examiner did not correct this clearly erroneous conclusion of law.

In *NLRB v. Insurance Agents' International Union*, 361 U. S. 477 (1960), this Court expressly held that the use of economic strength during bargaining is not inconsistent with the duty to bargain. Mr. Justice Brennan, speaking for this Court, stated:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [A]t the present statutory stage of our national labor relations policy, the two factors—necessity for *good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.*"
>
> * * *
>
> "Nor does . . . [the Act] contain a charter for the National Labor Relations Board to act at large *in equalizing disparities of bargaining power between employer and union.*" [emphasis added] 361 U. S. at 489-490.

This Court in two recent cases again affirmed that there is nothing inconsistent between the use of economic strength during bargaining and the objectives of the National Labor Relations Act. *NLRB v. Brown,* 380 U. S. 278 (1965); *American Ship Building Co. v. NLRB,* 380 U. S. 300 (1965).

As stated by Mr. Justice Harlan in his separate opinion in *NLRB v. Borg-Warner Corp.,* 356 U. S. 342, 358 (1958):

> "If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party to collective bargaining which was in an *economically disadvantageous position.*" [emphasis added].

The Trial Examiner committed a clear error of law in concluding that reliance by the Company during bargaining upon its relative economic strength was inconsistent with the Act and the Court of Appeals compounded this error not only by neglecting to correct it but also by evaluating the bargaining positions of the parties on the dues check-off issue and by compelling the Company to agree to such provision.

II

The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court, in That the Court of Appeals Held That the Company Had a Duty to Bargain With Regard to a Dues Check-Off Provision Even Though the Union Precluded Bargaining on the Subject by Taking the Position That It Would Never Sign a Contract Without Such Provision.

It is an undisputed fact in this case that the Union negotiators stated to the Company negotiators that the

Union would never sign an agreement without a dues check-off provision. This fact was partially acknowledged by the majority of the Court of Appeals when they stated in their opinion:

> "Throughout the negotiations, both before the prior order and subsequent to it, the union had insisted on a dues check-off." (A. 28).

Judge Miller in his dissenting opinion specifically recognized this fact in stating:

> "The union was just as adamant in refusing to sign a contract which did not contain a checkoff clause or some other means of company aid in collecting union dues. Its representative informed the Company's negotiator of this firm purpose, and counsel for the Board's General Counsel (the charging party) told the examiner that his inquiry showed the union would not sign a contract without a checkoff. Thus, the union never intended to bargain on that issue; it simply stated it must have a dues collection provision or there would be no contract." (A 34).

The Union's adamant position throughout the negotiations that it would never sign a contract without a dues check-off provision precluded any real bargaining on the subject. Because of this, it should have been found as a matter of law that the Company had no duty to bargain over a dues check-off provision and therefore could not be found to have bargained in bad faith over such provision. The Board has consistently applied such rule of law in prior cases. *Edward Axel Roffman Associates, Inc.*, 147 N.L.R.B. 717 (1964); *American Cyanamid Co.*, 129 N.L.R.B. 683 (1960); *Times Publishing Co.*, 72 N.L.R.B. 676 (1947).

In the *Times Publishing* case, the Board said:

". . . a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. *If it cannot be tested, its absence can hardly be found.*" [emphasis added] 72 N.L.R.B. at 683.

In the *American Cyanamid* case, the Board stated:

"We agree with the Trial Examiner that the issue presented to us is a narrow one, *i.e.*, whether the Respondent's refusal in the context of the Union's request for copies of its records for study and analysis outside the plant supported the alleged violation of Section 8(a)(5) and (1) of the Act. We find that it did not. This is so because *the adamant insistence of the Union on its right to have the Respondent's records in the terms set forth in its demand precluded, in effect, a test of the Respondent's willingness to give the Union access to the wage information involved on mutually satisfactory terms.*" [emphasis added] 129 N.L.R.B. at 684.

This same rule of law has been recognized by at least three Courts of Appeals, including the District of Columbia Circuit. *NLRB v. Lambert*, 250 F.2d 801, 803-04 (5th Cir. 1958); *United Electrical, Radio & Machine Workers v. NLRB*, 223 F.2d 338, 344 (D. C. Cir. 1955), *cert. denied* 350 U. S. 981 (1956); *Superior Engraving Co. v. NLRB*, 183 F.2d 783, 794 (7th Cir. 1950), *cert. denied* 340 U. S. 930 (1951).

In *Superior Engraving*, Judge Lindley speaking for the Seventh Circuit, said:

"Petitioner has consistently contended that an employer cannot be guilty of a refusal to bargain if the Union is not itself bargaining in good faith. *This is correct. . . .*" [emphasis added] 183 F.2d at 794.

Judge Miller in his dissenting opinion expressly pointed out the applicability of this rule of law to the present case:

"Thus, the union never intended to bargain on that issue; it simply stated it must have a dues collection provision or there would be no contract. In these circumstances, it is difficult for me to understand how it can be said that the Porter Company's position on the checkoff issue 'did indeed frustrate the bargaining.' *Because of the union's attitude on the issue — its stated determination not to negotiate in good faith with respect to it — bargaining as to a checkoff provision was impossible from the beginning.* Yet it is the Company, not the union, which has been found guilty of an unfair labor practice." [emphasis added] (A 34).

This Court apparently has never ruled on whether a party continues to have a duty to bargain on a subject where the other party has precluded the possibility of true bargaining through an adamant take-it-or-leave-it position on the subject. This case squarely presents the issue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 19,507

H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review, and Cross-Petition to Enforce, an Order of the National Labor Relations Board
Decided May 19, 1966

Mr. Michael H. Gottesman, with whom *Mr. Elliot Bredhoff* was on the brief, for petitioner in No. 19,492.

Mr. Donald C. Winson, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of court, with whom *Messrs. Bartholomew A. Diggins, Daniel W. Sixbey* and *Paul R. Obert* were on the brief, for petitioner in No. 19,507.

Mr. Elliott Moore, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Morton Namrow,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

WRIGHT, *Circuit Judge*: These cases are before the court on petitions filed by both the union and the employer to review a final order of the National Labor Relations Board. The Board has filed a cross-petition to enforce its order requiring the company to bargain in good faith.

Pursuant to a secret ballot election, the union was certified on October 5, 1961, as the collective bargaining representative of all production employees at the employer's Danville, Virginia, plant. After four years of bargaining and two orders from the Board requiring the employer to cease and desist from refusing to bargain collectively with the union, the second of which included the provision that the employer also cease and desist from "interfering with, restraining or coercing employees in the exercise of their right to self-organization * * *," no agreement has been reached. It is the second order which is the subject of these proceedings, the first order having been summarily enforced on July 17, 1964, by the United States Court of Appeals for the Fourth Circuit after the company filed no exceptions to the trial examiner's findings or proposed order. See 61 STAT. 147 (1947), 29 U.S.C. § 160(c).

The narrow issue presented by the present proceeding, according to trial examiner, is "whether, as the General Counsel contends, [the employer's] position on the Union's demands for a check off was a mere device to frustrate agreement on a contract, or whether, as [the employer] contends, it was merely engaging in 'hard bargaining,' with no intention of preventing an agreement." The trial examiner concluded that the employer's refusal to grant a check-off was "for the purpose of frustrating agreement with the Union and hence [the employer had] engaged in bad-faith bargaining." The Board, through a

three-member panel convened pursuant to Section 3[1] of the National Labor Relations Act, adopted the trial examiner's findings, conclusions, recommendations and proposed order.

The employer, citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), maintains that the trial examiner's finding that the company refused to agree to a dues check-off provision in order to frustrate an agreement is not supported by substantial evidence on the record considered as a whole. It argues that, while Section 8(d)[2] of the Act requires good faith bargaining, it does not compel either party to agree to a proposal or require the making of a concession. Our study of the record, however, convinces us that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the company's adamant refusal to consider a union dues check-off for those employees who individually requested it did indeed frustrate the bargaining.

In the prior proceeding, in which the Board likewise found violations of Sections 8(a)(5)[3] and (1)[4] of the Act, in addition to making unilateral changes in working conditions which it had refused to grant the union,

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1. 73 STAT. 542 (1959), 29 U.S.C. § 153(b).
2. 61 STAT. 142 (1947), 29 U.S.C. § 158(d).
3. 61 STAT. 141 (1947), 29 U.S.C. § 158(a)(5).
4. 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(1). Sections 8(a)(1) and (5) of the Act read:

"(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

the company had also refused to agree to an arbitration provision while insisting on a no-strike clause. This insistence, the Board found, demonstrated bad faith bargaining on the part of the company contrary to the observation in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 455 (1957), that "* * * the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."

In spite of the Board's order in the prior proceeding, it was not until ten months and 20 bargaining sessions following its issuance that the company receded from the position which the Board had found to amount to an unfair labor practice. When bargaining was resumed after the Board's prior order, some 14 items were open and unresolved. At the time of the final meeting on September 10, 1964, only three items remained unresolved, the union having given in on all of the others.[5]

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5. The representative of the union testified, without contradiction, as follows:

Q. When parties began meeting in October of 1963, how many items were there that the union was demanding; before they would agree to a contract?
A. Fourteen.
Q. Your testimony is that they are now demanding three?
A. Well, actually, it covers a number of things.
Q. What's happening to those issues that you didn't refer to in your testimony earlier?
A. In the hopes of getting an agreement, the union gradually held twenty meetings, and dropped all those demands except those I mentioned.

The examiner reported that subsequent to the Board's prior order "each of the parties withdrew certain of its bargaining proposals." With reference to the company's concessions, the examiner is apparently referring to the withdrawal of the company's no-strike clause demand without arbitration, which withdrawal was required by the Board's prior order.

Throughout the negotiations, both before the prior order and subsequent to it, the union had insisted on a dues check-off. The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a check-off, or some adequate subsitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation.[6]

The company admitted that it had no general policy against a dues check-off; that indeed in some of its divisions the bargaining agreements so provide.[7] The company admitted, too, that the refusal to check off union

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6. The check-off is included in 92 per cent of all contracts in manufacturing industries. See BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, p. 87:3. Most of the contracts not containing check-off provide some alternative method of dues collection on company property. *Id.* at p. 87:901.

7. Q. Is there a company policy, that is a policy of H. K. Porter Company, against the check-off of union dues?

A. [By Witness T. C. Jones, chief negotiator for the company] We do have some contracts at some of our plants that do have check-off, I do know that.

Q. Is there, to your knowledge, a company policy against the check-off?

A. Being a company policy, not that I know of.

Q. Is there a company policy against the collection of union dues on company property?

A. Not any that I am aware of.

Q. So your position on these matters is not dictated by company policy?

A. That is correct.

dues at the Danville plan was not based on inconvenience.[8] As a matter of fact, the Danville plant was checking off from the salaries of its employees for purchase of United States savings bonds, dependents' coverage under health insurance, United Fund, and a Good Neighbor Fund.[9] The company's position, as stated by its counsel and by its chief negotiator, was simply that "our

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8. Q. You have never taken the position, have you, that there was any inconvenience to the company in checking off union dues?
   A. [By Witness Jones, chief negotiator] To the best of my knowledge, no, sir, we have not.
   Q. In point of fact, there would be no more inconvenience, would it, than checking off Savings Bonds or insurance coverage or United Fund contributions, or any other item?
   A. That's right.
   Q. As I understand your testimony, I want to get this clear, your sole reason for rejecting the demand for a check-off or for dues collection in the plant was that this was union business?
   A. Right; this was union business, and the union should collect their own business; yes, sir. And I should have nothing to do with it.

9. Q. I'll be right direct with you, Mr. Jones [chief negotiator], does your company, or has your company in the past made any deductions from payroll, other than those required by law?
   A. Yes, sir.
   Q. Would you name what the purpose was for which those deductions were made?
   A. We deduct Treasury Bonds.
   Q. United States Savings Bonds?
   A. The United States Savings Bonds. We deduct dependents coverage on the insurance policy; we deduct —

   Trial Examiner: That's health insurance?

   The Witness: Yes, sir. And we deduct a United Fund and Good Neighbor Fund.

purpose in denying check-off was that we were not going to aid and comfort the union."[10]

It is clear from the record in this case that the prior order of the Board, drawn, as is the order in suit here, in terms of the statute,[11] requiring the company to bargain in good faith, was ineffective. Instead of starting a new Section 10(b)[12] proceeding, the Board no doubt could have requested the Fourth Circuit to cite the company for contempt for continuing failure to bargain in good faith. Certainly a succession of Section 10(b) proceedings resulting in Board orders cast in statutory language is not the answer where refusal to bargain persists. In order to eliminate further frustration of the purposes of the Act,[13] the union suggests that the Board should have included in its order a provision requiring the company to withdraw its objecton to the dues check-off. Moreover, the union suggests that, since the company not only refused the check-off but also refused to allow the union to collect dues during non-working hours on non-working areas of the company premises,[14] a fur-

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10. Q. [By counsel for the company] As I understand your testimony, the reason for refusing to grant check-off or collection of union dues, was that you were not going to aid and comfort the union, in the union business?
A. [By Witness Jones, chief negotiator] Yes, sir, that's right.

11. Section 8(a)(5), 29 U.S.C. § 158(a)(5).

12. 61 STAT. 146 (1947), 29 U.S.C. § 160(b).

13. 61 STAT. 143 (1947), 29 U.S.C. § 159. See also 61 STAT. 141 (1947), 29 U.S.C. § 141.

14. Q. Mr. Jones [chief negotiator], you were in the room when Mr. Bloodworth testified, were you not?
A. Yes, sir.

ther provision should be included in the Board's order protecting this statutory right as well.

It is true, as the company contends, that under Section 8(d)[15] it cannot be compelled to agree to a pro-

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Q. His testimony was that the subject was discussed, the subject of check-off was discussed at almost all of your meetings; and the company's consistent position has been that you will not check off union dues, is that correct?
A. That's correct.
Q. He also testified that the union ordered to withdraw his request for check-off, if the company were willing to agree to some kind of an arrangement, whereby the union could collect its dues in the plant, from employees during periods when they were not working?
A. That is correct.
Q. They made that offer?
A. Yes, sir.
Q. What was your position on that?
A. My position is and was then that that's union business.
Q. And therefore —
A. They could collect their own dues at their own meetings or at their offices.
Q. Your position that you would not permit this on the plant grounds?
A. Yes, sir.

* * * * * * *

Trial Examiner: What is your objection to a union official collecting it from employees at the lunch hour, or when coming to or leaving work?

The Witness: I just think that I should not help the union collect their dues, and this is what I am doing, when I let them collect it on company property, when they can go right to their union meetings that they hold here and collect the dues at the regular meetings they have in town.

15. Section 8(d), 29 U.S.C. § 158(d), reads in part:
"For the purposes of this section 1, to bar-

posal or make a concession. But neither can refusal to make concessions be used "as a cloak * * * to conceal a purposeful strategy to make bargaining futile * * *." *N.L.R.B. v. Herman Sausage Co.*, 5 Cir., 275 F.2d 229, 232 (1960). "Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *N.L.R.B. v. Insurance Agents' Union,* 361 U.S. 477, 485 (1960).

While it is clear from the record that the company had no reason, other than to frustrate the bargaining pocedure, to refuse to accept the dues check-off,[16] it is

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gain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."

16. Footnote 9 in the trial examiner's findings reads in part:

"This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. * * *"

This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off

not necessary to include a specific reference to the check-off in the Board's order.[17] Nor, in the circumstances of this case, is it necessary to provide in the order that the union shall have the right to collect dues during non-working hours on non-working areas of the company's premises.[18] In any contempt proceeding, the record made before the Board in both Section 10(b) proceedings will be available to this court. Thus we will be in a position to make a judgment based not only on the Board's order, but on the entire record of this company's performance at the bargaining table.

Affirmed and enforced.

WILBUR K. MILLER, *Senior Circuit Judge,* dissenting in No. 19,507: It is my view that the Labor Board's decision, here under review, is not supported by substantial evidence when the record is considered as a

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was "for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining." To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded.

17. Compare *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 341 (1944); *Burr v. N.L.R.B.*, 5 Cir., 321 F.2d 612, 615 (1963).

18. It would serve no useful purpose to have another § 10(b) proceeding to require the company to allow the union to collect dues during non-working hours on non-working areas of the company's premises. The issue was raised in these proceedings and the company offered no good reasons for its flat refusal to allow the dues collection on its premises. Compare *Republic Avia-*

whole in the manner described and prescribed by *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474 (1951). Consequently, I cannot agree with my brothers of the majority when they say in their opinion:

> ". . . Our study of the record, however, convinces us that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the company's adamant refusal to consider a union dues check-off for those employees who individually requested it did indeed frustrate the bargaining."

The union was just as adamant in refusing to sign a contract which did not contain a checkoff clause or some other means of company aid in collecting union dues. Its representative informed the Company's negotiator of this firm purpose, and counsel for the Board's General Counsel (the charging party) told the examiner that his inquiry showed the union would not sign a contract without a checkoff. Thus, the union never intended to bargain on that issue; it simply stated it must have a dues collection provision or there would be no contract. In these circumstances, it is difficult for me to understand how it can be said that the Porter Company's position on the checkoff issue "did indeed frustrate the bargaining." Because of the union's attitude on the issue—its stated determination not to negotiate in good faith with respect to it — bargaining as to a a checkoff provision was impossible from the beginning. Yet it is the Company, not the union, which has been found guilty of an unfair labor practice.

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tion Corp. v. N.L.R.B., 324 U.S. 793 (1945); *N.L.R.B. v. Walton Manufacturing Company,* 5 Cir., 289 F.2d 177 (1961).

The examiner's decision, adopted by the Board, dwelt on the union's need for a checkoff which could be granted by the Company without inconvenience to itself. And the majority opinion notes the union's consistent insistence on a dues checkoff and attempts to justify it by saying:

> ". . . The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a checkoff, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation."

But the record shows the union has a mailing address at the home of a member in Danville. Members could mail their dues to that address or to the office in Roanoke, or dues could be collected at the monthly union meetings. Moreover, it was shown that the union has a potential income of $1,500 per month from the Danville members, which would seem to justify the establishment of a small office in that town where dues could be paid. Thus there was no real necessity for the union's unalterable insistence on a checkoff clause.

Nevertheless, the examiner said in his decision:[1]

> ". . . I find and conclude that with respect to the issue of checkoff, Respondent [the Company]

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1. Without discussion or comment, a three-member panel of the Board adopted the examiner's findings, conclusions and recommendation. So we must turn to the latter's decision to ascertain the findings and conclusions which the Board adopted as its own.

bargained with the Union from October 23, 1963, through September 10, 1964, in bad faith and thereby violated Section 8(a) (5) and (1) of the Act."

He also stated:

". . . My careful consideration of the entire record convinces me that Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the checkoff issue, for the purpose of frustrating agreement with the Union, and hence engaged in bad-faith bargaining. . . ."

He said he based the foregoing conclusion upon three "factors," which I here reproduce, largely in his own words:

1. That the demeanor of T. C. Jones, the Company's negotiator, while testifying in the present proceeding, "convinced me that his attitude toward collective bargaining had not changed since he testified in the prior case."[2]

2. "Jones' explanation for [*sic*] his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act." This reason for refusing to agree to a checkoff tended, the examiner said, to disparage or discredit the union in the eyes of the employees.

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2. The "prior case" is discussed later in this dissent.

3. "In the instant case Respondent seeks to explain away the fact that at other plants it has contracts with unions which provide for a check-off, by arguing, in substance, that those provisions were brought about by reason of the economic strength of the union there involved, and urges that the Union's remedy in this case was to call a strike rather than prosecute an unfair labor practice charge. Not only does such a position by an employer run counter to the objectives of the Act which Congress set forth in its statement of 'Findings and Policies' (see Section 1 of the Act) but it also demonstrates that Respondent's purpose was to forestall reaching an agreement with the Union by the expedient of disparaging the latter in the eyes of the employees. Cf. *Sunbeam Plastic Corporation,* 144 NLRB 1010. This would seem to be particularly true in view of Respondent's admission that checking off union dues would impose no burden upon it, and its admitted checkoff for Government Bond and United Givers Fund, neither of which seem particularly necessary for the promotion of Respondent's business."

Thus it is apparent the examiner base his conclusion that the Company had bargained in bad faith upon three "factors," none of which rises to the level of proof: (a) that Jones's demeanor showed antiunion animus, and (b) that two of the positions taken by the Company during bargaining tended to disparage or discredit the union in the eyes of the employees. Nothing else in the record was pointed out by the examiner as supporting his conclusion, and I have discovered nothing which in the slightest degree supports it. His conclusion, then,

stands or falls on the validity of the antiunion animus and union disparagement "factors" which he expressly set forth.

Antiunion animus on the part of an employer, even if shown by the record, is not an unfair labor practice. *Metal Processors' Union* v. *N.L.R.B.*, 119 U. S. App. D. C. 78, 81, 337 F. (2d) 114, 117 (1964). For that reason, the first of the three "factors" upon which the examiner relied to support his conclusion of bad-faith bargaining falls of its own weight, even if the examiner's holding of Jones's alleged antiunion animus had been borne out by the record. But here the examiner did not purport to base his finding of antiunion animus on any evidence in the record, but merely on his own statement that "Jones' demeanor while testifying in the immediate proceeding convinced me that his attitude toward collective bargaining had not changed since he testified in the prior case."

The "prior case" to which the examiner referred arose from a complaint charging the Porter Company with bad-faith bargaining because, after 28 bargaining sessions between November 3, 1961, and November 27, 1962, the parties had not reached an agreement. The recommended order of the examiner in the prior case, issued with his decision on September 20, 1963, required the Company, upon request, to bargain with the union. Without waiting for the Board's decision,[3] the Company began almost immediately to bargain with the union as ordered by the examiner in the prior case. The parties met in 21 bargaining sessions, beginning October 23, 1963, and ending September 10, 1964. These

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3. Which for some reason not stated was not issued until April 15, 1964.

meetings, the subject of the present proceeding, were fruitful. Of the 14 issues which were open and unresolved when the meetings began October 23, 1963, 11 were resolved by the process of bargaining, so that only three remained unresolved at the adjournment of the final session on September 10, 1964. These were wages, health and life insurance, and checkoff.

The examiner in the earlier case did not find that Jones had antiunion animus; the present examiner decided that for himself from a reading of the prior examiner's decision, and then concluded that Jones's demeanor in the present proceeding showed he still had that animus. The present examiner said in this connection:

> "I fully recognize that because an employer engaged in bad-faith bargaining in one set of negotiations, it does not necessarily follow that the employer's subsequent bargaining negotiations were conducted in bad faith. I merely hold that an employer's bad-faith bargaining in the prior negotiations is a factor to be considered, along with the other circumstances of the case, in determining whether his subsequent bargaining was in good faith."

Although the examiner found that, with respect to the checkoff issue the Company bargained with the union in bad faith and ordered resumption of bargaining, he expressly disclaimed any intention to require the Company to agree to aid in the collection of dues. Footnote 9 to the examiner's decision contains the following:

> "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form

of checkoff. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining, the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. . . ."

Thus the examiner gave lip service to Section 8(d) of the Act, 29 U. S. C. § 158(d), which is in part as follows:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . ." (Emphasis supplied.)

But his decision that, by not agreeing to a dues collection provision, which he thought the union badly needed and which would cause it no inconvenience, the Company had not bargained in good faith, left no room for doubt that what he termed good-faith bargaining would require the Company to yield on the checkoff issue. This is, of course, contrary to the express provision of the statute quoted above.

This leaves for consideration the other two "factors" upon which the examiner based his conclusion of bad-faith bargaining on the part of the Company. First, as he put it,

> "Jones' explanation for his refusal to agree to any of the Union's suggestions for the collection

of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act. The very act of bargaining with a union, thus granting it recognition as the representative of the employees, in and of itself gives aid, comfort, assistance and prestige to that Union. But the policies of the Act, and the basic principles upon which it rests, require an employer to give this kind of 'aid and comfort' to the designated representatives of its employees. For, as the Board had held in a somewhat comparable situation, it is inconsistent with the bargaining obligation which the Act imposes upon an employer for the latter to conduct negotiations with the statutory representative in such a manner as to disparage or discredit the statutory representative in the eyes of its employee constituents. *General Electric Company,* 150 NLRB No. 36."

The second "factor" was another statement of the Company, to which I have heretofore referred. The examiner said it showed the employer's purpose "was to forestall reaching an agreement with the Union by the expedient of disparaging the latter in the eyes of the employees."

The examiner was indeed hard put to it when he concocted these two "factors" as bases for his conclusion. He confused the union with its members and erroneously thought an employer is somehow required to avoid any act which may disparage or discredit a union in the eyes of the employees. The Act is for the benefit of employees and not unions and, as Mr. Justice Rut-

ledge said, "Nothing in the Act requires an employer to maintain a union's prestige. . . ."[4]

Additionally, I pointed out that the examiner did not expressly find that the Company said or did anything which actually disparaged or discredited the union; he merely said disparaging or discrediting a union is inconsistent with an employer's duty under the Act. As Mr. Justice Rutledge said, 326 U. S. at 399, "Something more than mere supposition should underlie a conclusion which supports a finding of unfair practice."

The fact that the examiner's three "factors" fall so far short of supporting his conclusion of bad-faith bargaining on the part of the Company, and the further fact that the record considered as a whole is devoid of support for his conclusion, lead me to think the examiner was actuated by antimanagement animus. The three-member panel of the Board which rubber-stamped the examiner's decision either did so without examining the record or, I suggest, shared his antimanagement animus.

Before concluding I call attention to the following statement in the majority opinion:

> ". . . When bargaining was resumed after the Board's prior order, some 14 items were open and unresolved. At the time of the final meeting on September 10, 1964, only three items remained unresolved, *the union having given in on all of the others.*" (Emphasis supplied.)

The italicized clause is erroneous. Even the examiner did not go so far; on this subject, his decision said:

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[4]Concurring in part in May Stores Co v. Labor Board, 326 U. S. 376, 398 (1945).

". . . During the negotiations which followed, each of the parties withdrew certain of its bargaining proposals, so that upon adjournment of the final meeting on September 10, only 3 items remained unresolved. These were wages, health and life insurance, and checkoff. . . ."

I have heretofore quoted a portion of the examiner's footnote 9 to show that even he realized he could not order the Company to agree to a checkoff because Section 8(d) of the Act provides that the mutual obligation of an employer and a union to confer in good faith

". . . does not compel either party to agree to a proposal or require the making of a concession . . . ."

With respect to this the majority opinion says in footnote 16:

"Fotnote 9 in the trial examiner's findings reads in part:

"'This is not say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. * * *'

This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off was 'for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining.' To suggest that

in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded."

Thus, in holding the examiner's footnote 9 should be disregarded, the majority hold in effect that Section 8(d) of the Act should be disregarded, and that the Company should be held in contempt if, on remand, it does not agree to a contractual provision for some sort of Company aid in the collection of union dues.

I have seldom seen a record so barren of support for the decision of the examiner and the Board, and I earnestly dissent from the majority opinion which upholds that decision.

I concur in the affirmance of No. 19,492.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD RESPONDENT. v. H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No 19,492 September Term, 1965 No. 19,507

On Petitions to Review, and Cross-Petition to Enforce, an Order of the National Labor Relations Board.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

ORDER

These cases came on to be heard on the record from the National Labor Relations Board and on petitions to review, and cross-petition for enforcement of, the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by this court that the order of the National Labor Relations Board on review in these cases is affirmed, and that it shall be enforced.

Pursuant to Rule 38( ) the respondent shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Wright

Dated: May 19, 1966

Separate opinion by Senior Circuit Judge Wilbur K. Miller dissenting in No. 19,507, and concurring in affirmance of No. 19,492.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 392

H. K. PORTER COMPANY, INC., DISSTON DIVISION—DANVILLE WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24-44) is not yet officially reported. The Board's decision and order (J.A. 45-54, 58-59)[1] are reported at 153 NLRB No. 119.

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[1] References designated "J.A." are to the joint appendix filed in the court below.

JURISDICTION

The judgment of the court of appeals were entered on May 19, 1966 (Pet. 45-46). The petition for a writ of certiorari was filed on July 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company refused the Union's request for a checkoff of union dues, not in good faith, but in order to prevent an agreement with the Union.

STATEMENT INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

On October 5, 1961, following its victory in a Board election, the Union [2] was certified as the collective bargaining representative of the approximately 300 production and maintenance employees at petitioner Company's Danville, Virginia, plant (J.A. 45-46; 17-18, 39, 42).[3] The Company and the Union

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[2] United Steelworkers of America, AFL-CIO.

[3] The Union maintains no office in Danville, that area being serviced from the Union's office in Roanoke, a distance of about 83 miles (J.A. 46).

met 28 times for the purpose of negotiating a contract, but failed to reach an agreement (J.A. 46). Upon charges filed by the Union, the Board found that the Company, acting through Plant Manager Jones, had failed to bargain in good faith by, *inter alia*, adamantly refusing to agree to an arbitration provision while insisting that any contract contain a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times (J.A. 46). The Board ordered the Company to cease its illegal conduct and to bargain in good faith with the Union, and, on July 17, 1964, the United States Court of Appeals for the Fourth Circuit granted summary enforcement of the Board's order (J.A. 46).[4]

The present proceeding involves the Board's subsequent finding that the Company refused to bargain in good faith during the negotiations which resumed on October 23, 1963, about a month after the issuance of the Trial Examiner's Decision in the earlier case (J.A. 47, 49; 12-13). Between that date and September 10, 1964, when negotiations ceased, 21 meetings took place, but again no agreement was reached (J.A. 47; 13-14, 44).

When the negotiations broke off, three items remained unresolved: wages, health and life insurance, and checkoff—that is, the deduction of union dues by the Company from employees' paychecks (J.A. 47; 14-15). A checkoff was discussed at virtually all of the 21 meetings, and each time the Company rejected

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[4] The Company did not except to the Trial Examiner's findings, conclusions, and recommended order (J.A. 46).

the Union's request, claiming that the collection of dues was the "union's business" which the Company would not foster or promote (J.A. 47; 17, 27-28). In an effort to reach accord, the Union, on several occasions, offered to withdraw its checkoff request if the Company would permit either the Union's stewards, or its financial secretary, to collect dues, when they became due, in nonworking areas of the plant during nonworking hours (J.A. 47; 17, 23). The Company also rejected these alternative proposals, on the ground that it would not "aid and comfort the International at this location" by allowing the Union to collect dues at any time on Company property (J.A. 47; 16-17, 27-30, 33-35).

At the hearing before the Board, Jones, the Company's plant manager and chief negotiator (who also had represented it in the previous conferences), explained that the Company had no policy against permitting checkoff or dues collection on its premises, and that the rejection of the Union's proposals was his own decision as "top man" at the Danville plant (J.A. 48; 25, 28). Jones admitted that the Company had collective bargaining agreements with unions at other plants, which contain checkoff provisions (*ibid.*). He also stated that his objection to a checkoff, and to the Union's alternative proposals, was not based upon "any inconvenience to the company"; he indicated that the Company regularly made periodic payroll deductions at its Danville plant for a variety of purposes, including the purchase of United States Savings Bonds, health and life insurance coverage for employees' dependents, and contributions to the Unit-

ed Givers Fund and a "Good Neighbor Fund" (J.A. 48; 25-28, 44).[5]

On the basis of the foregoing facts, the Board, adopting the trial examiner's decision and recommended order (J.A. 58), held that the Company failed to bargain in good faith about a check-off, in violation of Section 8(a)(5) and (1) of the Act (J.A. 50-51, 58). The Board found that the Company's intransigent position with respect to check-off, and its rejection of the Union's substitute proposals, was motivated not by good faith considerations but by a desire to frustrate agreement with the Union (J.A. 49). The examiner found, based on Jones' demeanor as a witness, that Jones had not abandoned the hostile attitude which he had displayed toward the Union in the earlier negotiations, but continued to regard the Union as "an evil to tolerate" (*ibid.*). The examiner also pointed out that the Company had conceded that a check-off imposed no burden on it, and that it had check-off provisions in its other contracts (J.A. 50). The Board's order (J.A. 51-53) directs the Company to cease and desist from the unfair labor practice found, and to bargain with the Union upon request.

The court of appeals (Judge Wilbur K. Miller dissenting) held that the Board's findings were supported by substantial evidence, and enforced the order (Pet. 24-44).

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[5] The Good Neighbor Fund, which was a weekly payroll deduction of 10 cents to pay for gifts for hospitalized employees, plant parties, special charitable donations and the like, had been discontinued about a year prior to the hearing herein (J.A. 48, n. 7; 26).

ARGUMENT

As the court below recognized (Pet. 25), the sole question is whether substantial evidence supports the Board's finding that the Company refused the Union's request for a check-off of union dues, not in good faith, but in order to prevent an agreement with the Union. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, in the light of the Company's past history of bad faith bargaining, its admission that the refusal to check off union dues at the Danville plant was not based on inconvenience but simply on its unwillingness to give "aid and comfort" to the Union, and the fact that it had granted a checkoff in contracts covering its other plants (see pp. 3-5, *supra*), the Board was amply warranted in concluding that it refused a checkoff at Danville merely to block an agreement at that plant.

Nor is the Board's decision in this case contrary to the admonition in *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404, that the Board shall not "compel concessions" or "sit in judgment upon the substantive terms of collective bargaining agreements." As the court below pointed out (Pet. 31-32), although the Company "cannot be compelled to agree to a proposal or make a concession," a "refusal to make concessions [cannot] be used 'as a cloak * * * to conceal a purposeful strategy to make bargaining futile * * *.'" (quoting from *National Labor Relations Board* v. *Herman Sausage Co.*,

275 F. 2d 229, 232 (C.A. 5)). On the findings of the Board, sustained by the court below, the Company's refusal to grant the Union a checkoff was such a "cloak."

Similarly, the Board's order in this case did not violate the provision of Section 8(d) of the Act that the statutory duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession * * *." The Board's order merely directs the Company to bargain with the Union. The Board rejected the Union's request to include a provision "requiring the company to withdraw its objection to the dues check-off" (Pet. 30), and the court of appeals upheld that ruling (Pet. 30-33).

To be sure, the court of appeals stated (Pet. 32) that it was "clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off." It may well be, in view of "the entire record of this company's performance at the bargaining table" (Pet. 33), that the Company would be unable to justify, as a defense in a contempt proceeding, any further adamant refusal to grant either a check-off or one of the Union's alternative suggestions for facilitating collection of dues. In other words, the Company's past refusal to bargain may have been so egregious that it can now demonstrate its good faith only by making some concession to the Union's demands on this subject. However, even in that event, the Company would be doing so not because of any compulsion of the court of appeals, but because its own "perform-

ance at the bargaining table" made such a concession the only convincing way by which it could demonstrate its good faith.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 392

H. K. PORTER COMPANY, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION[1]

COUNTER-STATEMENT OF THE CASE

The facts of this case are substantially undisputed.

The Union, which was the charging party before the Board, was certified as the bargaining representative of the production and maintenance employees of the Company's Danville, Virginia plant on October 5, 1961. The Union's five year attempt to obtain a collective bargaining agreement has thus far been unavailing.

[1] The petition for certiorari, in its caption, does not list United Steelworkers of America (AFL-CIO) (hereinafter "the Union") as a respondent herein. The Union was a party below, however, and therefore is automatically a respondent herein.

The "bargaining" which took place during the thirteen months between the date of certification and November 27, 1962 was the subject of a prior unfair labor practice proceeding. *H. K. Porter Co.,* Case No. 5-CA-2785. The Trial Examiner found, in that case, that the Company had failed to bargain in good faith.[2] The Company filed no exceptions to the Trial Examiner's decision; it was adopted by the Board; and the Board's order was enforced by the United States Court of Appeals for the Fourth Circuit (No. 9504, unpublished; issued July 17, 1964).

During most of 1963, the Company refused to meet with the Union at all. After the Trial Examiner's decision in the first case issued, on September 20, 1963, the Company returned to the bargaining table and during the next twelve months 21 more meetings were held. (J.A. 44, 47). The present case involves the Company's conduct at these meetings.

At the outset of this new round of meetings, there were fourteen issues in dispute. By the last meeting, there were only three—checkoff, insurance, and wages. (J.A. 47, 14-15). With one exception, the disputed issues were resolved only because the Union withdrew its demands. (J.A. 15). During the entire course of the negotiations between these parties, the Company has made only one concession—and that was a concession which it was required to make by reason of the Board's order in the prior proceeding. The Trial Examiner in that case had held, *inter alia,* that it was an unfair labor practice for the Company to insist on a no-strike

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[2] The violations found by the Trial Examiner in that case consisted of over-all bad faith bargaining, unilateral changes in terms and conditions of employment, and insistence on a no-strike clause coupled with a refusal to grant any form of grievance arbitration. The Trial Examiner concluded, *inter alia,* that the Company "was demanding in effect that the Union relinquish the basic rights conferred by the Act or it would not receive a contract," and that the Company's actions were designed to "subvert the Union's position as the statutory representative."

clause and simultaneously to refuse to agree to any arbitration procedure for resolving grievances. The Company, which did not challenge that decision, became legally obligated to comply with it either by agreeing to provide some form of grievance arbitration or by dropping its demand for a no-strike clause. Yet it was not until the 20th meeting, which took place ten months after the Trial Examiner's decision, that the Company finally withdrew its demand for a no-strike clause. (J.A. 15-16).

While this delay is itself evidence of the Company's continuing bad faith, and was so regarded by the court below (A27), the present proceeding also involved another aspect of the bargaining. Throughout the bargaining, a key issue has been the Union's request for the "checkoff"—i.e., the deduction by the Company of union dues from the wages of employees who voluntarily authorize such deductions in writing pursuant to Section 302 of the Labor Management Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. § 186. The Company has consistently and adamantly refused to agree to this request (J.A. 47).

In its meetings with the Union, the Company gave only one reason for its refusal to agree to the checkoff—that the collection of union dues is "union business." (J.A. 16, 28). At the hearing, the Company explained that "we were not going to aid and comfort the International Union at this location," (J.A. 34, 31, 35), and its counsel acknowledged that "our refusal to grant the checkoff clause has been harassment of the International Union." (J.A. 11).

The Company admitted at the hearing that it has made deductions from employees' wages for other purposes including the purchase of United States Savings Bonds, the purchase of optional insurance coverage for employees' dependents, contributions to the United Fund, and contributions to a so-called "Good Neighbor Fund" (which was administered by the employees, prior to their unionization, for parties, charitable donations, gifts to employees who are hospital-

ized or who suffer a loss in the family, etc.). None of these deductions is required by law. (J.A. 25, 27, 44).

The Company also admitted that there would be no inconvenience involved in checking off union dues (J.A. 28), and that in fact it does check off union dues at some of its other plants (J.A. 32).

The Trial Examiner found that the Company had engaged in bad-faith bargaining in violation of Sections 8(a)(5) and (1). (J.A. 48-51). He concluded from all the evidence in the record, that the Company's sole reason for refusing the checkoff was to "frustrate agreement with the Union." (J.A. 49). The Company's explanation for its position—that it did not wish to give aid and comfort to the Union—was held by the Trial Examiner to "evidence an attitude inconsistent with the obligation imposed . . . by the act" to bargain in good faith and with a sincere desire to make an agreement (Ibid.). The Board issued a "short form" order affirming the Trial Examiner in all respects, and ordering the Company to bargain in good faith.

The Company petitioned for review to the court below, challenging the Board's finding that it had violated the Act. The Union also petitioned for review, contending that the Board's order was not adequate to remedy the violation, and that in the circumstances of this case the Company should be ordered to withdraw its resistance to the checkoff. The court below denied both petitions, and enforced the Board's order, but in its opinion interpreted the Board's order as requiring the Company to withdraw its resistance to checkoff, thus providing relief equivalent to that sought by the Union in its petition for review.

ARGUMENT

The petition for certiorari contains three "questions presented." Two of these (numbered "1" and "3") involve the correctness of the determination that the Company violated Section 8(a)(5) of the Act by failing to bargain in good

faith. The third (numbered "2") involves the propriety of the remedy prescribed for that failure. As we show herein, none of these questions is worthy of this Court's attention, and, as to the last, there is a serious question whether this Court has jurisdiction.

A. Questions Involving the Correctness of the Determination that the Company Violated Section 8(a)(5) (Questions Presented Nos. 1 and 3).

The Company seeks to litigate in this Court questions which were not in issue in the court below. The petition for certiorari challenges the *legal* sufficiency of the Board's finding that the Company violated Section 8(a)(5). In the court below, however, the Company challenged only the *factual* support for that finding.

In a prehearing conference stipulation filed by the parties, and approved by the court below, its was stipulated that the sole "question presented" by the Company's petition to review was:

> "[W]hether substantial evidence on the whole record supports the Board's finding that the Company failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act." (J.A. 1-2).

This stipulation had the effect, under the rules of the court below, of "strictly limiting" the issue to the sufficiency of the evidence. *International Brotherhood of Boilermakers,* 259 F.2d 957 (D.C. Cir. 1958); Rule 38(k), Rules of U.S. Court of Appeals for the District of Columbia.[3]

The majority below was convinced "that the Board's findings are supported by substantial evidence on the record considered as a whole" (A26). Judge Miller dissented because

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[3] [H]ereafter, in cases affected by Rule 38(k), counsel will be strictly limited to the issues made by them with the approval of the court, except in extraordinary circumstances 'to prevent manifest injustice.'" *Int'l Bhd. of Boilermakers, supra,* 259 F.2d at 958.

"It is my view that the Labor Board's decision, here under review, is not supported by substantial evidence when the record is considered as a whole in the manner described and prescribed by *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474 (1951)" (A34).

This dispute over the substantiality of the evidence supporting the Board's decision—the sole issue raised by the Company in the court below—surely does not warrant resolution by this Court, Indeed, the Company does not even mention this issue in its petition for certiorari. Realizing that the only question which it presented to the court below is not worthy of review by this Court, the Company attempts to propound entirely different questions to this Court. This, of course, it may not do.

Moreover, wholly apart from this defect, the Company's "questions presented" do not warrant consideration by this Court. As we now show, neither the Board nor the court below made the broad legal pronouncements which the Company seeks to challenge here. On the contrary, their decisions are consistent with, and dictated by, prior decisions of this Court.

1. The first legal issue which the Company asks this Court to decide is whether the Board (or reviewing court) can "[sit] in judgment upon the substantive terms of the collective bargaining agreement" (Pet. 9). However, neither the Board nor the court below "sat in judgment" upon the terms of the agreement. Neither declared that a checkoff clause is an indispensable part of a collective bargaining agreement, or that an employer's failure to grant it is itself a violation of the Act. Rather, each held, on the basis of evidence in the record apart from the refusal itself, that the Company *in fact* had no objection to check-off and was resisting it for the sole purpose of avoiding agreement. Both relied on the Company's undisputed admissions: (1) that it had not refused the clause because of inconvenience to the Company (indeed that there was no inconvenience and

that the Company checked off for purposes other than union dues) (J.A. 28; A 28-29); (2) that it had not refused the clause as a matter of policy (indeed, that it granted the checkoff at other plants) (J.A. 32; A 28); and (3) that its sole reason for refusing the checkoff was that it did not want to "aid and comfort the union" (J.A. 31, 34, 35; A-29-30). As stated by the Company's attorney, "our refusal to grant the checkoff clause has been harassment of the International Union." (J.A. 11).

The decisions of the Board and of the court below are consistent with, and required by, this Court's decision in *NLRB* v. *Insurance Agents,* 361 U.S. 477, 485 (1960):

> "The first annual report of the Board declared: 'Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . . The Board has repeatedly asserted that good faith in the part of the employer is an essential ingredient of collective bargaining.' This standard had early judicial approval, e.g., *Labor Board* v. *Griswold Mfg. Co.,* 106 F.2d 713. Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents,* 361 U.S. 477 (1960).

Clearly, as the Board and the court below held, an employer whose sole motivation for resisting a union demand is his unwillingness to give "aid and comfort to the union" does not have "a desire to reach ultimate agreement, to enter into a collective bargaining contract."

This is the complete antithesis of good faith bargaining. A desire to harass the union or to avoid giving aid and com-

fort to the union is not a lawful reason for refusing to agree to a dues checkoff, or any other union demand. The principal business of a union, after all, is to negotiate collective bargaining agreements, and to improve the wages, hours and working conditions of the employees which it represents. And every agreement or concession which an employer makes in collective bargaining gives aid and comfort to the union with which the employer deals. If the attitude of the Company in this case were proper, therefore, it would follow that any employer could lawfully come to the bargaining table and say: "We are willing to talk about anything, but we will not agree to any proposal you make, because we know that anything we agree to will give aid and comfort to your union." Plainly, this is not bargaining, and most certainly it is not good faith.

An employer may refuse to agree to any union proposal on the ground that it will reduce his profits, increase his costs, injure his competitive standing, interfere with the efficiency of his operations, or otherwise conflict with his legitimate business interests. It is not good-faith bargaining, however, to accept or reject a union proposal on the basis of whether it will help or hurt the union. Thus an employer may not, as the Company admittedly did here, refuse to agree to a union dues checkoff solely because it would give aid and comfort to the union.

The Company's contention that the decision below conflicts with *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), is misplaced. In *American National Insurance*, this Court struck down a Board doctrine that the refusal of certain inherently desirable contract provisions is *per se* a violation of the Act without regard to the motive or behavior of the party. Here, neither the Board nor the court below premised the finding of bad faith on the refusal of the checkoff clause as such. Rather, they found from other evidence, including the Company's own admissions, that its sole purpose in refusing the demand was to prevent

agreement. It was not the refusal of the clause, but the desire to prevent agreement, which the Board and the court below held violative of Section 8(a)(5).

Likewise, the Company's contention that the court below "asserted seven grounds" constituting bad faith bargaining (Pet. pp. 10-11) miscomprehends the opinion below. The court below held only that the Board's finding of subjective bad faith—a desire to prevent agreement—was supported by substantial evidence. The seven items were enumerated as evidentiary factors supporting this single finding of unlawful motivation.

2. The other "question presented" by the Company in challenging the finding of violation is whether its bad faith bargaining is excused by the alleged bad faith of the Union in taking an "adamant position throughout the negotiations that it would never sign a contract without a dues checkoff provision." (Pet. p. 20). This is surely one of the reddest herrings ever dragged before this Court.

In the first place, the contention is based on an erroneous factual premise. The Union did offer to sign a contract without a checkoff provision; indeed, it offered several alternatives to a checkoff clause, each of which was rejected by the Company. Both the Union and Company negotiators so testified (J.A. 17, 27-28), and both the Board and the court below so found (J.A. 47; A 33, n. 18).

In the second place, even if the Union *had* told the Company that it could not sign an agreement without a checkoff clause, it would not thereby have been bargaining in bad faith. As the record shows, the Union was faced with a financial problem in its efforts to represent employees at this plant. Its nearest office was 85 miles away (J.A. 17); the employees were scattered over a 35-40 mile radius (J.A. 17-18); and absent some means of dues collection at the plant it would be difficult, if not impossible, for the Union to have secured the revenue necessary to provide services to the employees. Even if these considerations *had* motivated the

Union to resist obligating itself to an agreement which did not provide a means for dues collection, there would have been no violation of the Act. The Company has overlooked the essential difference between such a "fixed position," had it been taken by the Union, and the "fixed position" taken by the Company. The Union's position would have been based on legitimate factors (and therefore taken in good faith) whereas the Company's position was admittedly based solely on a desire to avoid giving "aid and comfort to the Union" (and therefore was taken in bad faith). It is not the rigidity of the position, but the motivation therefor, that determines whether a party is negotiating in bad faith. *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952). It should be noted, in conclusion, that the Company has never filed a charge alleging that the Union's position on the checkoff constituted bad faith bargaining.

B. Question Involving the Remedy Prescribed for the Violation (Question Presented No. 2).

In affirming the Board's order that the Company bargain in good faith, the court below expressed its judgment that continued refusal to grant the Union's request for a checkoff clause would constitute contempt of that order. The Company challenges this expression as "indirectly compelling" it to agree to a checkoff clause, and claims that such compulsion is in violation of Section 8(d)'s provision that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

Before discussing the substance of this challenge, we feel constrained to raise a question concerning this Court's jurisdiction over the issue. There were two separate petitions for review filed in the court below, which were consolidated for hearing. The Company's petition (No. 19,507) challenged the Board's finding of a violation, but did not seek any change in the terms of the Board's order in the event the finding of violation were upheld. The Union's petition (No. 19,492) challenged the Board's order as inadequate, and

sought an order specifically requiring the Company to withdraw its resistance to the Union's checkoff demands. It was in response to the Union's petition (i.e. in case No. 19,492) that the court below made the comments challenged by the Company in its second "question presented." But the Company was not a party in No. 19,492. It did not intervene therein, and, although its case was consolidated with that case, such consolidation does not, under the rules of the court below, constitute the parties in one case parties to the other. Since the Company was not a party in No. 19,492, it is not entitled to petition for review of the lower court's action on that case. 28 U.S.C. § 1254(1); *United Automobile Workers* v. *Scofield*, 382 U.S. 203, 208-09 (1965).

Even if this Court had jurisdiction over the second "question presented," it would not be worthy of review. The Company does not challenge the terms of the Board's order as it was enforced, but only the prospective interpretation of the order contained in the court's opinion. Apparently, the Company wishes this Court to grant certiorari and, without in any way altering the terms of the Board's order, simply express disagreement with the court below as to the meaning of those terms. This seems a rather extraordinary basis for requesting this Court's attention.

In any event, there is no merit to the Company's criticism of the lower court's interpretation of the order. It must be remembered that the negotiations have been in progress for several years, and during that entire period the Company has never advanced any objection to the Union's checkoff demand except its unwillingness to aid and comfort the Union. Indeed, at the hearing, it admitted that it has no other objection. The Board and the court below have now held that its one ground for resisting the clause is an illicit ground. At this point, there clearly are only two possible alternatives available to the Company: it must either agree to the demand or manufacture new reasons for objecting to it. The court below warned that the manufacture of new grounds for resistance would be contemptuous (A32-33,

n. 16). This warning was an appropriate application of the principle enunciated in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), that "good faith bargaining necessarily requires that claims made by either bargainer be honest claims." Manifestly, any new ground for resistance advanced by the Company, after its disclaimer that there are any others, and the failure to advance any others for five years, could not be an "honest claim."

It follows that the Company, having no "honest claim" for resisting the Union's checkoff demand, must withdraw that resistance. This is simply an application of the principle, set forth in Section 8(d), that the duty to bargain requires a party to incorporate in a written agreement "any agreement reached if requested by either party."[4] Nor does this requirement conflict with Section 8(d)'s other provision that the duty to bargain "does not compel either party to agree to a proposal or required the making of a concession." The latter clause does not mean that an employer can say with impunity: "I have no objection to any of your proposals, but I nonetheless refuse to agree to any of them." Such a construction would render Section 8(a)(5) a dead letter, and would conflict with this Court's injunction that good faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485

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[4] The Company, in printing Section 8(d) in the "Statutes Involved" portion of its petition (Pet. p. 3) has carefully excised this phrase. For the convenience of the Court, we here quote the provision without excision, italicizing the portion omitted by the Company:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party,* but such obligation does not compel either part to agree to a proposal or require the making of a concession . . ."

(1960). The employer who has no objection to a Union proposal makes no "concession" when he incorporates that proposal into a collective bargaining agreement.

As the court below noted (A 32), in agreement with the Fifth Circuit, *NLRB* v. *Herman Sausage Co.*, 275 F.2d 229, 231 (1960), refusal to make concessions cannot be used "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." Rather, this provision of Section 8(d) means only that an employer need not yield "positions fairly maintained." *Herman Sausage Co., supra,* 275 F.2d at 231. It was enacted to prevent the Board from insisting that an employer abandon a position maintained in *good faith* merely because, in the Board's view, the position is "unreasonable, or unfair, or impractical, or unsound" (*Id.* at p. 231). Where, however, an employer has no objection to a union proposal, or has only an *unlawful* objection, this provision of Section 8(d) is inapplicable, anl the preceding provision requiring incorporation of undisputed issues in a written agreement governs.

It follows that the lower court's interpretation of its decree—which does not conflict with a decision of any other court—is correct. Even if this Court has jurisdiction of this issue, therefore, there is no reason for review.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be denied.

Respectfully submitted,

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